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91-560

No. _____

Supreme Court, U.S.
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In The Supreme Court of the United States October Term, 1991

SILAS ALEXANDER, et al.

v.

CHICAGO PARK DISTRICT, et al.

RUFUS COOK and COOK PARTNERS LAW OFFICES, LIMITED,
Counsel for Plaintiffs in the District Court,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October 7, 1991

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QUESTIONS PRESENTED

I. When the attorney for a plaintiff class in a civil rights action has negotiated individual contingent- fee agreements with all of the members of the class and wishes to enforce those contingent-fee agreements in accordance with *Venegas* v. *Mitchell*, ___ U.S. ___, 110 S.Ct. 679, 109 L.Ed.2d 74 (1990), must the attorney first obtain the permission of the District Court?

2. Did the District Court deny Petitioners due process of law when it effectively declared Petitioners' contingent-fee agreements invalid and imposed civil contempt sanctions that have mounted to millions of dollars upon Petitioners without conducting any evidentiary hearing into the circumstances surrounding Petitioners' contingent-fee agreements, the enforcement of those agreements, or the reasons for Petitioners' inability to comply with an order by the District Court that moneys collected under those agreements be turned over to members of the class?

PARTIES

In the United States Court of Appeals, the Appellants were Petitioners, Rufus Cook and Cook Partners Law Offices, Limited. Cook Partners Law Offices, Limited has no parent or subsidiary.

The Appellees were the members of a plaintiff class certified under Rule 23 of the Federal Rules of Civil Procedure and defined as

> "all black and Hispanic 'physical instructors' who took the allegedly discriminatory and non-job-related 'civil service examination' [administered by the Chicago Park District] in 1977 and 1978, and were thereafter terminated, retained in 'hourly' status, or reduced to or rehired in 'hourly status.' "

The membership of the class consists of the following persons, all of whom are residents of Chicago, Illinois: Earl Alexander; Herman Barnett; Kyle Booker; Odessa Bynum-Wynn; Bernadetta Depass; Terry Fisher; Rosemary Garrett; Elaine Gypsum; Ada Hinly; Evelyn Johnson; Preston Jones; Martha McGee; Clarence Milroe; Orlean Moultry; Earline Oglesby; Mattie Smith; Althea Tucker; Andrew Walton; and Booker Wilson.

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No. _____

In The Supreme Court of the United States October Term, 1991

SILAS ALEXANDER, et al.

v.

CHICAGO PARK DISTRICT, et al.

RUFUS COOK and COOK PARTNERS LAW OFFICES, LIMITED, Counsel for Plaintiffs in the District Court,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Rufus Cook and Cook Partners Law Offices, Limited pray for the issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review its judgment and opinion of March 21, 1991, which affirmed an order holding Petitioners in contempt of court for enforcing contingent-fee agreements that they had entered into with all of the members of a plaintiff subclass in a civil rights class action and for failing to comply with an order that moneys collected under those agreements be turned over to those class members.

Opinion Below

The opinion of the United States Court of Appeals is reported at 927 F.2d 1014 (7th Cir. 1991) and also appears in the Appendix to this Petition.

Jurisdiction

The judgment of the United States Court of Appeals was entered on March 21, 1991. A timely Petition for rehearing was denied on May 10, 1991. By order dated July 30, 1991, Justice Stevens extended the time for filing this petition to October 7, 1991. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statement of the Case

This Petition arises out of a civil rights action brought under 42 U.S.C. § 1983 against the Chicago Park District, its Commissioners, and its Superintendent charging racial and ethnic discrimination in the allocation of Park District staff, resources and maintenance services among neighborhoods in Chicago and with racial and ethnic discrimination in employment.

The original complaint was filed on June 1, 1979, in the United States District Court for the Northern District of Illinois by several named plaintiffs on behalf of themselves and a principal class and several subclasses of similarly situated black, Hispanic and poor residents of Chicago. Jurisdiction of the federal court rested upon 28 U.S.C. § 1331, because each count of the complaint stated a claim arising under the Constitution or laws of the United States, and upon 28 U.S.C. § 1343, because the complaint sought to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States.

On April 4, 1980, the District Court certified a class action under Rule 23 of the Federal Rules of Civil Procedure, including the principal class and defined four subclasses. Two of these subclasses related to the claims of employment discrimination, which were Counts II and IV of the original complaint. For Count II, the subclass included

> "all black and Hispanic 'physical instructors' who took the allegedly discriminatory and non-job-related 'civil service examination' in 1977 and 1978, and were

> thereafter terminated, retained in 'hourly' status, or reduced to or rehired in 'hourly status.' "

The subclass certified for Count IV [1] consisted of

> "all current and former black and Hispanic employees of the Park District who have been injured by the allegedly discriminatory hiring, assignment, promotion and pay practices of defendants."

After class certification, the parties engaged in extensive discovery and pretrial proceedings.

During 1983, the District Court severed and held a separate trial on Count I of the Complaint, which alleged discrimination in the allocation of staff and resources. A jury returned a verdict for Defendants. On September 13, 1983, following the entry of judgment on the jury verdict, the District Court entered summary judgment for Defendants on all remaining counts, including the two counts alleging employment discrimination. In dismissing these two counts, the District Court held that Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e), preempted Plaintiffs' claim of racial discrimination in public employment.

On September 19, 1985, the United States Court of Appeals for the Seventh Circuit vacated the dismissal of the employment discrimination counts, holding that they were not preempted by Title VII. *Alexander* v. *Chicago Park District*. 773 F.2d 850 (7th Cir. 1985). After remand, Defendants moved again for dismissal of the employment discrimination claims. That motion was denied on December 5, 1986.

In April of 1988, the parties reached a settlement agreement on the employment discrimination claims. The settlement provided for affirmative relief in the form of offers to rehire or promote certain class members and to give civil service preference to black and Hispanic employees. The settlement also called for the Chicago Park District to pay $500,000, which would be used

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[1] As originally defined, the Count IV class also included persons injured by Defendants' hiring and assignment practices. Plaintiffs later eliminated the allegations of discrimination in the hiring and assignment of employees, and the District Court adopted the class definition quoted in the text on November 25, 1987.

to pay claims of members of the Count II subclass and to pay Plaintiffs' costs and attorneys' fees.

On September 26, 1988, after notice to the class and a hearing on the fairness of the settlement, the District Court approved the settlement. The Court based its approval not only on the amount of the cash settlement fund that had been created, but also on the "substantial affirmative relief" provided by the agreement. Among others, the Court made the following findings:

> "Much of the relief which plaintiffs originally sought has already been obtained during the pendency of this litigation. Numerous class members have received promotions and entered better District jobs. The District has taken measures to utilize objective standards in the award of promotions and the administration of civil service testing. The District has also increased the number of jobs subject to civil service regulations." (Findings 12/26/88 at 7.)

Petitioners have been counsel for the individual plaintiffs and the plaintiff classes since the commencement of this action in 1979. They prosecuted this action for almost a decade with no compensation for their time and no reimbursement of their expenses. Because a claim either for fair fees or even for all of their expenses would have totally depleted the settlement fund, Petitioners decided to seek no recovery of fees and to seek reimbursement of expenses not exceeding $350,000, which was less than half of the amount that Petitioners had advanced or committed to on behalf of the class. Petitioners announced this decision in a letter mailed to class members on May 2, 1988.

In compliance with this commitment to their clients, Petitioners filed a petition with the District Court on May 17, 1988, seeking an award of $350,000 as partial reimbursement of the costs of litigation, to be paid from the settlement fund. The petition was supported by affidavits showing that Petitioners had advanced or committed to more than $776,000 for the expenses of prosecuting the employment discrimination claims. Petitioners made no request for attorneys' fees. The District Court never held a formal hearing on the petition, but in an order dated September 26, 1988, awarded Petitioners reimbursement of only $108,906.01, less than one-third of the amount requested.

In this order the District Court chose to make some disparaging and unnecessary comments on the character and abilities of Petitioner Rufus Cook, including some unfounded speculation on his motivation for choosing not to seek attorneys' fees. The Court made these accusations despite its own recognition that Mr. Cook and his law firm had handled a complex and difficult civil rights action for almost ten years, had achieved substantial benefits for the classes that they had represented, and would receive no compensation for any of the legal services that they had rendered to the class.

Following a motion for reconsideration, the District Court increased the award of costs to $128,705.68, but reaffirmed its earlier opinion, publishing further disparaging comments about Mr. Cook in its order. Petitioners appealed the District Court's orders to the United States Court of Appeals for the Seventh Circuit. Defendant Chicago Park District then appealed an order denying its request to delay transfer of the settlement fund until the conclusion of Petitioners' appeal.

While these appeals were pending, Petitioners negotiated a Supplemental Settlement Agreement. That Agreement, which was executed on February 13, 1989, provided that the parties would request the District Court to withdraw certain of its opinions from publication, including the opinions that contained the disparaging remarks about Petitioners. Upon withdrawal of these opinions, the parties would withdraw all appeals, the process of distributing the settlement fund to class members would begin, and Petitioners would accept an award of costs in the amount of $128,705.68, as previously determined by the District Court.

Petitioners decided to accept the District Court's reduced award of costs, because they had contingent-fee agreements with every then-known member of the plaintiff subclass, which would enable them to recover additional amounts that would offset some of the remaining expenditures that they had made. Petitioners' intention to rely upon their contingent-fee agreements was fully disclosed in the Supplemental Settlement Agreement, which was filed (prior to its execution) with the District Court on February 3, 1989. The Agreement, which is very brief, contains the following disclosure:

> "WHEREAS, the dismissal of Plaintiffs' counsels' appeals over costs would moot the Park District's appeal over the District Court's transfer orders, and counsel have advised the court that Plaintiffs' counsel, *who have contingent fee agreements with certain of their clients through which part of their costs are recoverable*, will in view of that fact accept the award of statutory costs heretofore made by the court, in the interest of avoiding further delay in delivering to the class the relief afforded by the Settlement Agreement." (emphasis added.)[2]

The District Court accepted the Supplemental Settlement Agreement and on March 20, 1989, entered the following order:

> This matter coming to be heard on the joint motion of Plaintiffs and Defendants, *based on the Supplementary Settlement Agreement previously reviewed* by the court, to vacate this court's orders and opinions dated September 26, November 16, December 6, and December 16, 1988, and the court being fully advised in the premises;
>
> IT IS HEREBY ORDERED THAT:
>
> 1. The court's September 26, November 16, December 6, and December 16, 1988 orders and opinions are vacated and held for naught and the appropriate steps will be taken by the court to effectuate the withdrawal of them from publication;
>
> 2. "Final judicial approval" of the Settlement Agreement Subject to Court Approval made between the parties the 25th day of April, 1988 (hereinafter Settlement Agreement) shall take place on the entry of this order.
>
> 3. Pursuant to paragraph 5 of the Settlement Agreement, Plaintiff's counsel is hereby awarded statutory costs of $128,705.68.

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[2] Petitioners' contingent-fee agreements were already on file with the District Court, as required by General Rule 39(d) of the Rules of the United States District Court for the Northern District of Illinois.

> 4. The Court retains jurisdiction of this matter to assure compliance by all parties with the obligations which accrue upon "final judicial approval" of the Settlement Agreement.
>
> (Order March 20, 1989) (emphasis added)

Petitioners thereafter began to distribute funds to the members of the Count II subclass. From each class member's share, Petitioners deducted an amount to compensate for a part of the costs that they had advanced in the litigation. In accordance with their previous commitments to their clients, Petitioners limited the amount they would collect to $350,000. In a letter that accompanied each class member's share of the fund, Petitioners explained their deduction of costs pursuant to the contingent-fee agreements.

The District Court inquired into Petitioners' handling of the settlement funds in a hearing held September 22, 1989. At that hearing, the District Court stated that, notwithstanding the plain language of the Supplemental Settlement Agreement, which the Court had reviewed before entering its order of March 20, it had not been made aware of the existence of the contingent-fee agreements. In an order entered October 4, 1989, the District Court directed Petitioners to distribute $379,170.77 to the class, which represents the settlement fund of $500,000 plus accrued interest, less the costs that the Court had awarded. In effect, the District Court prohibited Petitioners from enforcing their contingent-fee agreements with their clients.

The difference between the District Court's award of $128,705.03 in costs and the $350,000 that Petitioners had collected under their contingent-fee agreements was $221,294.04 – an amount that Petitioners no longer had available. Consequently, Petitioners could not – and did not – comply with the District Court's order. On April 10, 1990, the District Court held Petitioners in contempt for failure to comply with the Order of October 4 and imposed a fine of $100 per day, to increase by $100 for each day that Petitioners fail to pay the additional costs to the members of the class. No evidentiary hearing was held in connection

with this contempt order; nor were Petitioners afforded any real opportunity to explain or justify their conduct.[3] As of the date of this Petition, Petitioners' liability for contempt sanctions is more than $7 million and is growing at an accelerating rate, which is now more than $35,000 per day.

The United States Court of Appeals for the Seventh Circuit has affirmed both the order of October 4, 1989 and the contempt order of April 10, 1990. *Alexander* v. *Chicago Park District*, 927 F.2d 1014 (7th Cir. 1991) (Appendix A). Despite the plain language in the Supplemental Settlement Agreement disclosing Petitioners' intention to enforce their contingent-fee agreements, the Court of Appeals concluded that "Cook hid his intent to enforce the contingent fee agreement from the court" (App. A, p. 21). The Court then ruled that "Cook's deception, in combination with the requirement of district court approval of contingent fees with members of a class action, renders the agreements unenforceable" (App. A, p. 21).

Reasons for Allowance of a Writ of Certiorari

1. The rulings of both the District Court and the Court of Appeals rest on the premise that Petitioners had an affirmative duty to present their contingent-fee agreements to the District Court for approval and that enforcing these agreements without explicit judicial approval constitutes a form of deception which deprives Petitioners of their rights under these contracts. This premise is clear error. In particular, it is contrary to this Court's ruling in *Venegas* v. *Mitchell*, ___ U.S. ___, 110 S. Ct. 1679, 109 L.Ed.2d 74 (1990). The supervisory powers of federal district courts do not authorize this kind of regulation of the private contractual arrangements between attorneys and clients.

This intrusion into the attorney-client relationship is especially inappropriate in civil rights cases, where plaintiffs' lawyers commonly find themselves the targets of personal, emotionally charged attacks. The error of the Court of Appeals is so plain and so threatening to the security of lawyers who

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[3] The District Court did issue an order to show cause before it issued its contempt order; however, when Petitioners responded to the order to show cause with a request for a hearing, the District Court simply brushed that request aside and entered the contempt order.

regularly represent plaintiffs in civil rights actions, that this Court's review of the decision is justified.

In *Venegas* v. *Mitchell*, like this case a civil rights action, the District Court had awarded attorneys' fees under 42 U.S.C. § 1988, and had determined that $117,000 was a reasonable award. The plaintiffs' attorney then attempted to collect a substantially larger amount – $406,000 – that was due under a contingent-fee agreement. This Court held that the attorney had a right to enforce the agreement:

> "In sum, § 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer. What a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement are not necessarily measured by the 'reasonable attorney's fee' that a defendant must pay pursuant to a court order. Section 1988 itself does not interfere with the enforceability of a contingent-fee contract." (110 S.Ct. at 1684.)

After *Venegas*, there can be no arguing that a District Court's determination of a "reasonable" attorneys' fee and "reasonable" costs are limitations on an attorney's right to enforce a contingent-fee agreement. Yet the District Court presumed to impose such a limitation, and on that erroneous presumption, was affirmed by the Court of Appeals. Petitioners enforced contingent-fee agreements to collect an amount in excess of the costs awarded by the court, as *Venegas* plainly allows, and both of the courts below found the action improper, in some manner "deceptive," and grounds for forfeiture of Petitioners' rights under these agreements.

It is important to note that neither court undertook to exercise the kind of supervisory powers that courts have previously exercised over contingent-fee agreements. That form of supervision considers whether the terms of the agreement, and in particular the percentage of the recovery due the lawyer, is reasonable in light of the type of lawsuit, the standard practices of the particular legal community and the risks associated with the specific lawsuit. *See, Venegas* v. *Skaggs*. 867 F.2d 527, 534 (9th Cir. 1989), *affirmed sub. nom, Venegas* v. *Mitchell*, ___ U.S.

___, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990). Neither the District Court nor the Court of Appeals gave any consideration to these questions. Those courts simply held that once the District Court had determined a "reasonable" level of costs, Petitioners could not, without prior leave of court, collect more than that amount, even if their contingent-fee agreements with their clients clearly authorized such collection. These holdings cannot be reconciled with *Venegas*.

The effect of this erroneous decision is to subject civil rights lawyers to thorough judicial regulation on their private fee arrangements with their clients. This is a dangerous development that invites judicial abuse. In the darkest days of the civil rights battles in the South, lawyers for the plaintiffs regularly found themselves as the principal defendants in the litigation, and often ended up destroyed professionally and financially. This Court's decision in *NAACP* v. *Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed. 2d 405 (1963), reviews some of that history. Those practices have diminished in our time, but they have not altogether disappeared. To hold that a lawyer is completely dependent upon the court's prior approval for his compensation, even his privately negotiated compensation, threatens a return to the days of making the civil rights lawyer the ultimate defendant.

This lawsuit is a clear example of these dangers. The courts below have found that Petitioners engaged in "deception" by enforcing a contingent-fee agreement, notwithstanding the fact that they filed a paper with the District Court stating their intention to do so in plain, simple English. And the District Court has found that Petitioners "may be more concerned with their own financial interests than with the impact of their petition on the class members who they represent" (Order 12/6/88 at 5 n. 4), when Petitioners have voluntarily refrained from seeking recovery of any of their fees or of more than half of their costs.

Indeed, the harsh tones adopted by the courts below have completely obscured the services that Petitioners have rendered their clients. After prosecuting this action for almost ten years, with no compensation, Petitioners have succeeded in causing the Chicago Park District to correct several of their discriminatory employment practices. The District Court expressly acknowledged the substantial gains that this litigation has achieved.

Petitioners' reward for this successful vindication of their clients' civil rights has been an ugly scar on their professional reputations and the threat of their financial ruin.

The lesson of this tragedy will not be lost on other civil rights lawyers, who will have good reason to hesitate before taking on a potentially unpopular case. To prevent this harm to civil rights litigation, this Court should not leave standing a decision holding that a civil rights lawyer may not rely for compensation on a reasonable contingent-fee agreement. Petitioners urge the Court to review the decision of the Court of Appeals and reaffirm the holding in *Venegas* v. *Mitchell*, ___ U.S. ___ 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990).

2. A separate basis justifying this Court's review of the decision below arises from the fact that the District Court refused to conduct an evidentiary hearing either with respect to the validity of the contingent-fee agreements which it effectively found to be unenforceable or with respect to the contempt order it issued when Petitioners failed to distribute to class members the moneys it had collected pursuant to those agreements. The fact that no hearing was held on either of these matters is undisputed.

The Court of Appeals upheld the denial of hearing on the contingent-fee agreements on the theory that Petitioners' deceptive conduct, as disclosed on the face of the record, rendered those agreements unenforceable (App. A, p. 21):

> "The district court never would have approved such a circumvention of her original decision on expenses. Surely Cook knew that. Thus Cook hid his intent to enforce the contingent fee agreement from the court; through two hearings and numerous briefs, Cook never told the court he would enforce contingent fee agreements regardless of the court's final decision on expenses. His reliance on a cryptic reference to contingent fees in the supplemental settlement agreement was not sufficient. Cook's deception, in combination with the requirement of district court approval of contingent fees with members of a class action, renders the agreements unenforceable."

There is absolutely no justification for this kind of cavalier disregard of Petitioners' right to a hearing. Even accepting the factual premise that "Cook never told the court he would enforce contingent agreements" – a premise palpably at variance with the truth – the District Court plainly should have held a hearing on this matter before the contingent-fee agreements were set aside. *Dunn* v. *H.K. Porter Co., Inc.*, 602 F.2d 1105, 1106 (3d Cir. 1979).

As to the District Court's refusal to hold a hearing before issuing the contempt order, the Court of Appeals brushed that aside on the ground that no hearing was necessary because there was no question that Petitioners had failed to comply with the District Court's October 4, 1989 order. Essentially, the Court of Appeals held that given Petitioners' non-compliance with the October 4, 1989 order, there were no genuine issues of material fact to be resolved at a hearing (App. A, p. 22).[4]

In this respect, both the District Court and the Court of Appeals have fallen into egregious error. The District Court could not properly issue its contempt order merely because Petitioners had failed to comply with the October 4, 1989 order. Quite the contrary, the issuance of the contempt order required a finding of Petitioners' non-compliance with that order, but also a finding that Petitioners were capable of complying with the order, but chose not to do so. Indeed, that is the essence of civil contempt. See *Hicks* v. *Feiock*, 485 U.S. 624 n.9 (1988) ("punishment may not be imposed in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order.") No finding of ability to comply with the order could be made without a hearing, for such a finding necessarily would involve an inquiry into the financial circumstances of Petitioners, and possibly an inquiry into the circumstances which led Petitioners into an inability to comply with

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[4] The Court of Appeals based its holding on its prior decision in *In the Matter of Grand Jury Proceedings Empanelled May 1988*, 894 F.2d 881 (7th Cir. 1990) — a decision which actually holds that a hearing must be granted if there are genuine issues of material fact (894 F.2d at 883).

the order, if that in fact is shown to be the case.[5]

As indicated above, had such inquiries been held, Petitioners would have shown that they were unable to comply with the October 4, 1989 order. Because of commitments that had been made in connection with the prosecution of the class action litigation, Petitioners would have shown that the moneys collected under the contingent-fee agreements were disbursed long before the October 4, 1989 order was entered and that Petitioners were financially unable to comply with that order when it was entered. Petitioners were not given an opportunity to make such a showing.

In this respect, the decision below constitutes such a clear and radical departure from the normal course of judicial proceedings that the supervision of this Court is clearly warranted.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully Submitted,

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[5] Judge Posner has suggested that a further inquiry might be necessary into circumstances bearing upon the appropriateness of the particular sanction imposed as a means of ensuring compliance. *In the Matter of Grand Jury Proceedings Empanelled May 1988*, 894 F.2d 881, 885 (7th Cir. 1990). Given the magnitude of the sanction imposed here, a hearing plainly should have been held on that issue.

APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 89-3440 & 90-1807

SILAS J. ALEXANDER, MARY ALLION
and KAREN TURNER, et al.,

and

EARL ALEXANDER, HERMAN BARNETT
and KYLE BOOKER, et al.,

Plaintiffs-Appellees,

v.

CHICAGO PARK DISTRICT,
LESLIE P. LISS, as attorney and
agent for the CHICAGO PARK DISTRICT,
and in his individual capacity and
PATRICK O'MALLEY, et al.,

Defendants.

Appeal of: RUFUS COOK and COOK PARTNERS
LAW OFFICES, LIMITED.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 79 C 2242—**Ilana D. Rovner**, *Judge.*

ARGUED SEPTEMBER 18, 1990—DECIDED MARCH 21, 1991

Before POSNER, RIPPLE, and MANION, *Circuit Judges.*

MANION, *Circuit Judge.* Attorney Rufus Cook appeals two district court decisions regarding his expenses follow-

ing settlement of a civil rights action against the Chicago Park District ("Park District"). This dispute between Cook and his former clients relates to the appropriate disbursement of funds obtained by the settlement agreement. Cook sought enforcement of contingent fee agreements contrary to the disbursement ordered by the district court. The district court ordered the settlement money distributed according to the settlement agreement. When Cook failed to properly disburse the award, the district court held him in contempt and imposed a daily fine. Cook appeals the district court's ruling on expenses and its decision to place him in contempt. We affirm both district court orders.

I.

We must recount the lengthy history of this litigation to explain the present legal entanglement which pits a civil rights attorney against the class action members he formerly represented.

In 1979 plaintiffs Silas J. Alexander, et al., represented by Rufus Cook of Cook Partners Law Offices, Ltd., filed a seven-count amended complaint charging the Chicago Park District and Park District officials with racial discrimination in the allocation of recreational resources and in various employment practices. Count II of the complaint alleged that the Park District administered a racially and culturally biased examination for the position of "physical instructor" that resulted in lost wages, benefits, job security and employment opportunities.

In 1980 Judge George N. Leighton certified several classes, including a "Count II subclass" that included black and Hispanic "physical instructors" who took the allegedly discriminatory test in 1977 and 1978 and whose employment status was thereafter adversely affected. Over the next eight years most of the plaintiffs' claims were resolved in favor of the Park District,[1] but Count II and one

[1] For a more detailed summary of the early stages of this even then "convoluted" litigation, *see Alexander v. Chicago Park District*, 773 F.2d 850, 852-53 (7th Cir. 1985), *cert. denied* 475 U.S. 1095 (1986).

other count remained unresolved. In 1987 Judge Leighton retired, and Judge Ilana D. Rovner was assigned to the case. In April of 1988 the parties entered into a proposed settlement agreement on the remaining counts, which provided injunctive relief to each subclass and an award of $500,000 to the Count II subclass. In May of 1988 the parties jointly moved the district court for approval of the proposed agreement.

Paragraphs 1, 2(a) and (5) of the agreement described the settlement's key terms, leaving final decisions on fee disbursement squarely in the hands of the district court:

> 1. *Settlement Fund.* Within five days after final judicial approval (as hereinafter defined) of this Settlement Agreement, the Park District shall pay into a settlement fund to be controlled and administered by counsel for the plaintiffs, as trustees for the class, the sum of five hundred thousand dollars ($500,000.00). This settlement fund, plus any interest that accrues on it after its creation, shall be used as hereinafter described for the payment of settlement claims by members of the Count II class and for the payment of attorney's fees and costs to counsel for plaintiffs. The transfer of this sum by the Park District into such fund shall fully and forever discharge it and all other defendants from all monetary obligations they have under this Settlement Agreement or under this lawsuit.
>
> 2. *Claims against the Settlement Fund.*
>
> (a) There shall be initially paid from the Settlement Fund to plaintiffs' counsel such amounts as the Court shall hereinafter award, pursuant to paragraph 5 below, in attorney's fees and costs.
>
> * * *
>
> 5. *Fees and Costs.* Upon execution of this Settlement Agreement, counsel for plaintiffs shall file a petition to be paid reasonable fees and costs out of the Settlement Fund. *The Court shall dispose of this petition as it deems proper.* The defendants shall not

> participate in that disposition. The defendants shall have no liability whatsoever for any fees and costs incurred, in the past or hereinafter, by plaintiffs' counsel in the prosecution of any part of this lawsuit or in the administration of the Settlement Agreement.

(Emphasis added).

A proposed notice to class members was also presented for approval to the district court. Under a section titled "Cash Payments," the proposed notice stated that from the fund amount of $500,000, "plaintiffs' counsel will be paid such attorney's fees and costs as the Court directs. (See paragraph 7 below.) After payment of those fees and costs, the amount remaining in the Fund will be paid to eligible persons . . . ." Paragraph 7, entitled "Attorneys' Fees and Costs," stated that "[c]ounsel for plaintiffs has filed a petition to be paid reasonable fees and costs out of the Settlement Fund. Counsel for plaintiffs have petitioned the Court for fees and costs totalling $350,000. The Court will determine what amount it will award to counsel."

Cook also sent a personal letter to class members urging them to accept the settlement agreement. The eight-page letter recounted the history of the litigation, and under a section entitled "Partial Reimbursement of Costs and Expenses Advanced by Our Firm," described Cook Partners' monetary request:

> [U]nder the terms of the proposed settlement agreement, our law firm is to petition the court in order to be reimbursed a portion of costs and expenses our firm has advanced in pursuing this case, and for attorneys' fees. Unfortunately, notwithstanding the fact that our firm has pursued the litigation on behalf of each of you and the class as a whole for nine years now without any class member paying our firm one cent, we are not seeking so much as a dollar in attorneys' fees. We will seek only to be reimbursed approximately $350,000, representing a small portion of the expenses and costs we have incurred.

Consistent with the proposed agreement, Cook filed a petition for partial reimbursement of expenses. The petition listed total expenses of $776,773.01 incurred in prosecuting the Count II and Count IV claims, including: about $413,000 for "project management, computer operations and computer printing costs by the Law Data Centre"; approximately $111,000 for "personnel costs advanced to programmers at the . . . Law Data Centre"; and approximately $100,000 for "personnel costs advanced to the Chicago Project Administrator and support personnel of Policy Research Consultants". On June 10, 1988, the district court conducted a hearing on Cook Partners' expense petition. The court was concerned that several items in the petition lacked sufficient "descriptive and explanatory detail" to support an award. In particular, Judge Rovner was curious about the huge payments to Policy Research Consultants and the Law Data Centre. After Cook explained that Policy Research Consultants was a Washington, D.C. consulting organization hired to do statistical research that assisted in devising the case's statistical framework, the following colloquy occurred:

> THE COURT: Now, who is Junerous Cook?
>
> MR. COOK: Junerous Cook is my former wife from whom I have been divorced for some 20 years now. She is also a statistician and a research specialist. And she was with Policy Research Consultants. She had had a relationship of more than 25 years duration with the principles of that company, and they hired her to be the Chicago representative for them.
>
> THE COURT: And is Cook Development then her company?
>
> MR. COOK: No, Cook Development is a company in which I have an interest. I don't know how Cook Development enters into it though.
>
> THE COURT: There are some checks, as I recall, made out to Cook Development, but let me take a look. . . . Law Data Centre, Inc. That has the same address as Cook Partners. What is Law Data Centre?

MR. COOK: Law Data Centre is a computer service firm that sells company services and rents time on a mini computer that is located at that address, 1331 South Michigan.

THE COURT: And tell me what exactly they did.

MR. COOK: Well, all of this material that we obtained by discovery and otherwise from the Park District had to be processed, organized, and then computerized so we could make some sense of it. . . . So we had to take all of the raw data, have it entered into that computer, and then have it processed, analyzed and so forth. And Law Data Centre was the company that owned the computer and whose computer technicians were responsible for doing the programming and so forth that resulted in our ability to put the data in and to process it.

THE COURT: Who owns Law Data Centre?

MR. COOK: At that time I owned an interest in it. There was another fellow in Washington D.C. who was an owner in it.

After further discussion of the work performed by Policy Research Consultants and the Law Data Centre, the court returned to the $413,000 Cook claimed was still owed to Law Data Centre:

THE COURT: Who is the president of Law Data Centre?

MR. COOK: I believe the current president of Law Data Centre is Harold Algar.

THE COURT: Is that a company you have a part interest in?

MR. COOK: Yes. Yes.

THE COURT: How much of an interest do you have?

MR. COOK: At the time this work was done, I believe, I had a 60 percent interest in it. In 1985 I have

> bought out Mr. McWilliams, the lawyer in Washington, who owned 40 percent of the firm. I now own 100 percent of it. Clearly the firm has been unable to collect for the work it has done so it is not a very active firm at this point.

Judge Rovner requested further documentation from Cook on the specific tasks performed by individuals at Policy Research and the Law Data Centre who billed time, and whether that time was related solely to Counts II and IV. On June 16, 1988 Cook filed affidavits from himself, Lillian Schrean, office manager for Cook Partners, and Stanley Williams, chief programmer for the Law Data Centre.

On June 17, 1988, the court held a fairness hearing on the settlement agreement. One written objection was filed by the spouse of a deceased class member, who did not oppose the settlement but was critical of Cook Partners' request for more than half of the settlement proceeds. Cook Partners filed a memorandum relating to computer expenses on June 29, 1988, and a second affidavit from Schrean on July 7, 1988.

The district court approved the settlement on September 26, 1988, and in a lengthy opinion explained its decision to award Cook Partners only $108,906.01 instead of the $350,000 requested. Judge Rovner concluded that Cook

> has not met his burden of proving that the expenditures, assuming they were all made, were reasonable expenditures for this case. The Court finds plaintiffs' counsel's petition for costs and expenses to be excessive for a variety of reasons. To begin with, the sheer magnitude of the $350,000 which is requested for costs and expenses alone is unprecedented and somewhat mind-boggling. . . . The costs requested in this case are . . . approximately fifteen times as great as awards of costs in cases of similar magnitude.

The district court noted that the proposed award constituted 70 percent of the settlement funds, thus directly

cutting into the amount available to class members. The court pointed out that it could not be sure from the materials submitted whether the claimed expenses related only to the two counts on which the settlement agreement was reached. Judge Rovner expressed further "concerns over the types and amounts of expenses" incurred:

> [D]espite two attempts by plaintiff's [sic] counsel to explain the claimed expenses, the Court has been unable to determine exactly what was spent on the case even after many hours of review of the records. Similarly, the Court has been unable to determine that *any* of the expenses were incurred only with respect to those of the plaintiffs' claims which were successful. Counsel has essentially thrown a myriad of miscellaneous records onto the Court's lap and left it to the Court to determine what was actually and reasonably spent.

Judge Rovner's final criticism of the expense request was perhaps the most serious—a challenge to the "staggering" fees run up by the Law Data Centre and Policy Research Consultants:

> [T]he necessity of these services and the reasonableness of the costs which were expended on these services are called into some doubt by the particular circumstances involved. During oral proceedings in which plaintiffs' counsel attempted to explain his Petition, Mr. Cook admitted, somewhat hesitantly, that he owned Law Data Centre. Similarly, it was revealed that Mr. Cook's ex-wife is the Chicago representative for Policy Research Consultants. . . . These relationships raise questions concerning counsel's incentive to hold costs down, to "shop" for the most cost-efficient services, and to scrutinize the level of services which were required to pursue his case. They also raise questions concerning Mr. Cook's fulfillment of his fiduciary obligations to the class members, and it is questionable whether any compensation at all should inure to one who has acted other

> than in the most scrupulous fashion regarding the financial interests of the class.

Judge Rovner decided not to be so "punitive" as to completely deny Cook's expense request, and instead awarded 10 percent of the costs associated with the Law Data Centre and Policy Research. She also reduced the photocopying request by 50 percent because the amount sought per photocopy far exceeded the market rate, and reduced the award for witness fees to the amount of fees actually paid out. Thus the court reached the figure of $108,906.01, concluding that the reduced total "still represents a very generous award of costs and expenses in comparison with other cases." The court stated that it took into consideration Cook's decision to not seek attorney's fees, a decision the district court thought was prompted by Cook's recognition that his performance as plaintiffs' counsel had not "been of the standard expected by this Court." In a final footnote, Judge Rovner pointed out that the Seventh Circuit referred to Cook Partners' statistical analyses of park conditions as "shoddy" and "unprofessional," and that another district court judge had "found that plaintiff's counsel does not provide adequate representation to prosecute a class action."

Cook Partners immediately appealed Judge Rovner's fee decision to this court, and at the same time filed a Rule 60 motion for relief in the district court. The Rule 60(b) motion, according to Cook Partners, "responds to *each and every* misstatement, falsehood, libel and character assassination contained in the Court's September 26, 1988 opinion." In response to the Rule 60 motion, the district court increased the award to $128,705.68 because it concluded Cook Partners was actually entitled to the full photocopying expenses (Park District photocopying requirements made the extra expense necessary). However, the district court reaffirmed its other initial rulings and denied Cook Partners' other contentions, including the argument that an evidentiary hearing should have been conducted regarding the claimed costs:

> The movants' primary complaint is that this Court did not afford them sufficient opportunities to present evidence concerning the accuracy and reasonableness of their request for costs. On the contrary, plaintiffs' counsel were given several opportunities to develop such evidence . . . yet they now assert that the Court should have given them additional opportunities so long as the Court was not convinced of the reasonableness of their request for costs. Under this logic, no court would ever rule against a party, for the court would be required to continue returning to the movant and requesting additional information until the court was convinced that the movant's position was meritorious.

Cook Partners' appeal from the district court's Rule 60 ruling was consolidated with its earlier appeal. Meanwhile, the Park District appealed from a November 16, 1988 district court order denying its request to delay payment of the $500,000 to plaintiffs' counsel pending Cook Partners' appeal, and a December 16 order denying the Park District's motion to reconsider. The Park District had unsuccessfully argued that the settlement sum, payable upon "final judicial approval" of the settlement, was not payable until the Cook Partners appeal was resolved.

Beginning in January of 1989 Cook Partners and the Park District discussed a supplementary settlement agreement to resolve the remaining issues in dispute. If Cook Partners dropped its appeal from the district court's fee request orders, the Park District's appeal of the order denying delay of payment would be moot. Thus they agreed on a supplementary settlement that called for both parties to abandon their appeals, and for the district court's previous orders relating to Cook's expense requests and the district's delay requests to be withdrawn, and replaced by an order approving the supplementary settlement agreement. This agreement was approved by the district court in a March 20 order written by the parties.

The supplementary settlement agreement, which was drafted by Cook Partners, provided:

This Supplementary Settlement Agreement is made between Plaintiffs and Defendants by their respective counsel, for the purpose of mooting certain ancillary disputes that threaten to delay the implementation of the Settlement Agreement Subject to Court Approval (Settlement Agreement) previously approved by the district court.

WHEREAS, the district court has previously approved a Settlement Agreement that provides certain benefits, monetary and otherwise, to the class upon "final judicial approval" of the Settlement Agreement;

WHEREAS, in connection with the approval of that Settlement Agreement, the District Court reached certain conclusions regarding Plaintiffs' counsels' [sic] petition for award of statutory costs in accordance with 42 U.S.C. Section 1988, and entered orders and opinions dated September 26, 1988 and December 6, 1988, the effect of which was to award Plaintiffs' counsel statutory costs in the amount of $128,705.68;

WHEREAS, Defendants acknowledge that they have no interest in the amount of costs which Plaintiffs' counsel ultimately receive, whether statutory in nature or provided for in accordance with the terms of contingent fee agreements;

WHEREAS, Plaintiffs' counsel has appealed to the Court of Appeals for the Seventh Circuit from the District Court's September 26 and December 6, 1988 orders asserting that they were entitled to an evidentiary hearing on the conclusions reached by the court on their petition to be awarded statutory costs, and that the amount of costs awarded was inadequate;

WHEREAS, the District Court ordered Defendants to transfer the $500,000 fund immediately in orders dated November 16 and December 16, 1988, and then stayed these orders January 23, 1989;

WHEREAS, Defendant CHICAGO Park District [sic] has appealed to the Court of Appeals for the Seventh

Circuit from the District Court's November 16 and December 16, 1988 orders;

WHEREAS, the dismissal of Plaintiffs' counsels' [sic] appeals over costs would moot the Park DISTRICT's [sic] appeal over the District Court's transfer orders, and counsel have advised the court that Plaintiffs' counsel, who have contingent fee agreements with certain of their clients through which part of their costs are recoverable, will in view of that fact accept the award of statutory costs heretofore made by the court, in the interest of avoiding further delay in delivering to the class the relief afforded by the Settlement Agreement;

WHEREAS, the parties mutually agree that it is in their best interests to avoid further delays in implementing the Settlement Agreement and the expenses attendant to prosecution of the various appeals;

NOW THEREFORE, it is agreed as follows:

A. On the next business day following execution by the parties hereto of this Supplementary Settlement Agreement counsel for the parties shall file a joint motion in the Court of Appeals for the Seventh Circuit seeking a conditional dismissal of consolidated appeals nos. 88-3106, 89-1032 and 89-1102, and an immediate limited remandment of this cause to the District Court, in order to permit the parties jointly to move that court to vacate certain of its orders as described in paragraph B below;

B. On the next business day following entry by the Court of Appeals for the Seventh Circuit of an order conditionally dismissing said appeals and remanding the cause to the District Court, counsel for the parties shall file a joint motion with the District Court in which they provide the court with a copy of this Supplementary Settlement Agreement, and request the court to vacate its orders and opinions dated September 26, November 16, December 6 and

December 16, 1988 and in lieu thereof enter the order set forth in Exhibit A hereto;

C. In the event the district court declines to vacate in their entirety the orders and opinions entered September 26, November 16, December 6, and December 16, 1988 and in their place enter the order set forth in Exhibit A hereto, the parties shall within three days thereafter file a joint motion in the Court of Appeals seeking leave to reinstate appeals nos. 88-3106, 89-1032 and 89-1102;

D. In the event the district court enters the order attached hereto as Exhibit A, the parties in consideration of the mutual promises each has made to the other agree to waive and do hereby waive their mutual rights to appeal from the entry of that order.

The March 20 district court order provided:

This matter coming on to be heard on the joint motion of Plaintiffs and Defendants, based on the Supplementary Settlement Agreement previously reviewed by the court, to vacate this court's orders and opinions dated September 26, November 16, December 6, and December 16, 1988, and the court being fully advised in the premises;

IT IS HEREBY ORDERED THAT:

1. The court's September 26, November 16, December 6 and December 16, 1988 orders and opinions are vacated and held for naught and the appropriate steps will be taken by the court to effectuate the withdrawal of each of them from publication;

2. "Final judicial approval" of the Settlement Agreement Subject to Court Approval made between the parties the 25th day of April, 1988 (hereinafter Settlement Agreement) shall take place on the entry of this order.

3. Pursuant to paragraph 5 of the Settlement Agreement, Plaintiffs' counsel is hereby awarded statutory costs of $128,705.68.

> 4. The court retains jurisdiction of this matter to assure compliance by all parties with the obligations which accrue upon "final judicial approval" of the Settlement Agreement."

At last, Cook Partners began to distribute money to class members. But instead of withholding for expenses the $128,705.68 allowed by the district court, Cook Partners retained the $350,000 it sought in its initial petition. Judge Rovner was not informed of this development until August 31, 1989, when six of the 19 class members wrote a letter to the court asking why Cook was being allowed to keep two-thirds of the settlement, and inquiring whether they could challenge Cook's unilateral determination of their shares. They attached a copy of a letter to one of the class members informing her that "the contingent fee agreement you entered into with Cook Partners" was being enforced. Cook Partners argued that it was entitled to even more money under its contingent fee agreements with each class member, but settled for only 70 percent of the settlement fund so the class members could receive something.

The district court scheduled a hearing for September 22, 1989 to discuss the dispute. Rufus Cook explained to the court that he subtracted $350,000, along with 70 percent of the interest that accrued in the settlement fund, and distributed the remainder to the 19 eligible class members on a pro rata basis. Cook argued that the district court agreed to this distribution, and relied on language in the supplemental settlement agreements relating to contingent fees. Cook explained that he orally notified the court about the separate contingent fee agreements on two occasions. Cook also argued that his original letter to class members recommending settlement notified them that he intended to seek $350,000 from the fund, and that the class would only receive $150,000.

Judge Rovner was not persuaded. In an October 4, 1989 order, she vacated the March 20, 1989 order approving the supplementary settlement agreement, and reinstated

the September 26, 1986 and December 6, 1986 orders. She ruled that Cook Partners could not take from the settlement fund any amount greater than the $128,705.68 originally awarded. Judge Rovner further pointed out that she was never made aware of Cook's belief that he was "entitled to award himself additional expenses beyond the award approved by the Court," and described Cook's efforts as "an intentional attempt to deceive the Court and circumvent its order rejecting his request for $350,000 in expenses." The court went on to calculate the exact amount to which each class member was entitled, and ordered Cook Partners to file by November 30 a report certifying that those amounts had been properly distributed.

Instead of distributing the funds according to the October 4, 1989 order, Cook Partners filed a notice of appeal with this court, and filed a motion for reconsideration in the district court. Cook argued that the district court lacked jurisdiction to enter the October 4 order, and that it was entitled to further evidentiary hearings on the expense petition. On November 20, 1989, Judge Rovner, in an extensive and thorough memorandum opinion and order, denied Cook Partners' motions.

On January 2, 1990, when the district court learned Cook Partners still had not distributed the settlement funds in accordance with the October 4 order, the court issued a rule to show cause why Cook should not be held in contempt. Cook's January 24 written response argued he should not be held in contempt because 1) the district court lacked jurisdiction to enter its October 4, 1989 order; 2) the court of appeals might conclude that Cook had not been dealt with fairly by the district court; and 3) he was entitled to an evidentiary hearing regarding expenses prior to the October 4 order. Cook also argued that due process entitled him to a hearing before he could be held in contempt, and that Judge Rovner would be a "material witness" at the hearing and therefore should recuse herself from the matter. Finally, Cook asked the court for a stay of its October 4 order pending appeal.

The eligible class members, now represented by appointed guardian ad litem, filed a memorandum in support of a contempt finding and the imposition of monetary sanctions to enforce the October 4 order. On April 2, 1990, the district court issued an opinion and order denying Cook's request for a stay and finding Cook in civil contempt. The court found that Cook knowingly violated the October 4 order, and that no evidentiary hearing was required because the only relevant factual issue—whether Cook Partners complied with the order—was already resolved. The court expressed concern for the class members, who still had not received their award, and concluded that the only way to ensure Cook Partners' compliance with its settlement ruling was to raise "the specter of contempt":

> The Court regrets that well over a year after it made a determination as to the distribution of the common fund, the class members still have not received their payments. The strategy of Cook Partners has been to circumvent the Court's orders where possible, and to delay where circumvention is not possible. Cook Partners has demonstrated that when it disagrees with the Court's rulings, it believes it has the right to ignore them. It appears, therefore, that only through its contempt power is the Court able to secure enforcement of its orders. It is now time that the class members receive their compensation, and the Court can tolerate no further delays.

Judge Rovner gave Cook Partners until April 10, 1990 to pay the amounts due plus interest. Cook's failure to comply would trigger a fine of $100 per day, increasing by an additional $100 per day for each additional day that Cook did not disburse the funds. Cook failed to comply, and on April 12, 1990 the district court placed Cook in contempt and ordered the daily fine paid to the guardian ad litem on behalf of class members. Cook still has failed to disburse the funds, nor has he paid the civil contempt fine, which at oral argument was believed to be around $100,000. Cook appealed the contempt ruling, and that ap-

peal was consolidated with his earlier appeal from the October 4, 1989 order. We now turn to Cook's arguments on appeal.

II.

A. Appeal from the October 4, 1989 Order (No. 89-3440).

Cook Partners contends, as it did in its motion for reconsideration, that Judge Rovner lacked jurisdiction to rescind its March 20, 1989 order agreeing to the supplementary settlement agreement. Cook argues that the Federal Rules of Civil Procedure do not allow a court to alter or amend a decision six months after judgment is entered unless there is fraud. Cook contests the district court's assertion that it was not aware Cook intended to enforce its contingent fee agreements, and thus contends there was no fraud on the court.

As the district court correctly pointed out in its denial of Cook's motion for reconsideration, the supplemental settlement agreement signed by the court specifically provided for jurisdiction to remain in the district court: "The court retains jurisdiction of this matter to assure compliance by all parties with the obligations which accrue upon 'final judicial approval' of the Settlement Agreement." The question of whether Cook Partners properly disbursed settlement funds to class members falls squarely within this clause, and jurisdiction therefore was retained in the district court to consider class members' complaints about Cook Partners' proposed distribution. The district court's explicit retention of jurisdiction is consistent with its responsibility, pursuant to Fed.R.Civ.P. 23, to protect the interests of class members. Fed.R.Civ. P. 23(e) states that "[a] class action shall not be dismissed or compromised without the approval of the court." In *Brady v. Sullivan*, 893 F.2d 872, 877 (7th Cir. 1989), we noted that " 'district courts who enter judgment pursuant to [a settlement agreement] necessarily have the power to mandate compliance with it,' " (quoting *United States v. Baus*, 834 F.2d 1114, 1127 (1st Cir. 1987), and added that "[t]he court's intent

to retain jurisdiction need not be explicitly stated, but can be inferred," citing *McCall-Bey v. Franzen*, 777 F.2d 1178, 1188 (7th Cir. 1985). Retention of jurisdiction is enhanced when the court is attempting to protect members of a class action:

> In a class action, the district court has a duty to class members to see that any settlement it approves is completed, and not merely to approve a promise . . . to pay the relief to which it has decided class members are entitled.

In re Corrugated Container Antitrust Litigation, 752 F.2d 137, 141 (5th Cir. 1985).

Because the district court explicitly retained jurisdiction over the appropriate disbursement of the settlement funds, we need not decide whether Cook's conduct was fraudulent, or whether, as Cook claims, the district court misconstrued the terms of the supplemental settlement agreement. We wish to emphasize, however, that after our review of the record, we do not find fault with Judge Rovner's characterizations of Cook's conduct. Judge Rovner made a reasonable determination regarding the expenses to which Cook was entitled. She withdrew her original orders and agreed to the supplemental settlement agreement only because she understood that it did not change her decision on the amount of expenses due Cook. Cook's conduct in attempting to enforce contingent fee agreements, some of which were obtained from unsuspecting class members *after* the expense determination adverse to Cook, was a clear attempt to circumvent the district court's decision. By not informing the court and class members, prior to approval of the supplemental settlement agreement, that he intended to take $350,000 from the settlement fund, Cook at the very least misled the court. Judge Rovner was correct to reprimand Cook for his deceptive and unprofessional performance.

Cook argues that he is entitled to enforce the contingent fee agreements he reached with various class members, and that he should receive credit, not condemnation, for

waiving his right to statutory attorney's fees and to full contingent fees in exchange for receiving just 50 percent of his costs. Placed in context, Cook's contention is preposterous. In this case, Cook sought expenses in the amount of $350,000. Following a careful examination of Cook's request, which included a comparison with expenses awarded in similar cases, and concern over Cook's close relationship (even ownership) of businesses to which he claimed to owe money, the court awarded Cook Partners more than one-fourth of the settlement fund. Cook appealed the award without informing class members. He dropped the appeal in exchange for the Chicago Park District dropping its appeal on the immediacy of payment into the settlement fund. Then, without informing the court, Cook kept the $350,000 he originally asked for, relying on contingent fee agreements the district court knew nothing about. Finally, he disbursed money to class members without informing them that he had entered into a supplementary settlement agreement through which he was retaining approximately 45 percent more of the fund than he was awarded by the district court. Despite Cook's protests, his conduct was clearly not "consistent with the highest standards of our profession." *See Evans v. Jeff D.*, 475 U.S. 717, 728 (1986).

Cook first takes issue with the district court's remark that Cook's willingness to forego attorney's fees was motivated in part by his recognition that his representation was inadequate. That finding was amply supported by the record, which included this court's previous criticism of the "shoddy" and "unprofessional" statistical analysis he used, which perhaps was because the work's supervisor "operated out of [Cook's] office, factors which suggest her closer responsiveness to the strategic needs of the litigation rather than the detachment crucial to objective survey science." *Alexander v. Chicago Park District*, 709 F.2d 463, 468 (7th Cir. 1983), *cert. denied* 475 U.S. 1095 (1986). The court also took notice that Judge Shadur in a separate case ruled that Cook Partners was not qualified to prosecute a class action, and warned Cook Partners

of possible sanctions for misrepresenting facts to the court. *Armstrong v. Chicago Park District*, 117 F.R.D. 623, 631-32 (N.D.Ill. 1987), *aff'd* 886 F.2d 332 (7th Cir. 1989). The court later found that Judge Plunkett separately had affirmed the disqualification of Cook Partners as counsel for a debtor in a bankruptcy case because Cook Partners concealed an ownership interest in the debtor. *See In re Albright*, 95 B.R. 560 (N.D.Ill. 1989).

The district court was required under Fed.R.Civ.P. 23(e) to scrutinize any fee agreements that would be enforced as part of the settlement, because those agreements necessarily put counsel and clients in an adversary relationship. As the Third Circuit put it in *Dunn v. H.K. Porter Co.*, 602 F.2d 1105, 1109 (3d Cir. 1979):

> When a contingent fee contract is to be satisfied from a settlement fund approved by the trial judge pursuant to Fed.R.Civ.P. 23(e), the court has an even greater necessity to review the fee arrangement for this rule imposes upon it a responsibility to protect the interests of class members from abuse. In such circumstances, the role of the attorneys is drastically altered; they then stand in essentially an adversarial relation to their clients who face a reduced award to the extent that counsel fees are maximized.

In fact, greater scrutiny was warranted here because several fee agreements were not entered into until after the district court's expense determination, as the litigation was "reaching its culmination," when Cook was trying to find another way to get the $350,000. *See Pete v. United Mine Workers of America*, 517 F.2d 1275, 1291 (D.C.Cir. 1975). But Judge Rovner never had a chance to examine those contingent fee agreements because they were not called to her attention. The district court was led to believe Cook only desired a more "perfunctory" settlement agreement that did not leave the court's criticism of his representation on the record, and that the supplementary settlement agreement did not substantively change the nature of the agreement. Opposing counsel

stated by affidavit that, had he known of Cook's intent to keep $350,000 by entering into the supplementary settlement agreement, he would have considered it a "fraud upon the Court" and refused to participate. The district court never would have approved such a circumvention of her original decision on expenses. Surely Cook knew that. Thus Cook hid his intent to enforce the contingent fee agreement from the court; through two hearings and numerous briefs, Cook never told the court he would enforce contingent fee agreements regardless of the court's final decision on expenses. His reliance on a cryptic reference to contingent fees in the supplemental settlement agreement was not sufficient. Cook's deception, in combination with the requirement of district court approval of contingent fees with members of a class action, renders the agreements unenforceable.

The district court properly dismissed Cook's frivolous contention that "statutory costs" pursuant to 42 U.S.C. § 1988 were relevant in determining the expenses due Cook:

> Plaintiff's counsel waived any entitlement to fees and costs under § 1988 by entering into the settlement agreement. If they had not done so, defendants likely would not have agreed to settle the case.

The court went on to cite *Skelton v. General Motors Corp.*, 860 F.2d 250 (7th Cir. 1988), *cert. denied* 110 S.Ct. 53 (1989), where we held that the district court, applying equitable principles, would determine the appropriate fees when "a settlement fund [was] created in exchange for release of the defendant's liability both for damages and for statutory attorney's fees . . ." *Id.*, 860 F.2d at 256. Therefore, the case law regarding statutory fees under 42 U.S.C. § 1988 is largely irrelevant here.

Cook's final argument is equally frivolous. Cook contends that he was never granted an evidentiary hearing on his costs petitions, in violation of his due process rights. The district court recounted the "hundreds of pages of documents" it reviewed following two hearings

and three separate filings relating to expenses. Cook had ample opportunity to make his case, and the court was not required to give him more chances simply because he disagreed with its final decision.

B. Appeal from the Civil Contempt Order (No. 90-1807).

There is no question that Cook disobeyed the court's October 4, 1989 order to disburse settlement money to class members in the amounts determined by the court, so there was no need for the "evidentiary hearing" requested by Cook. *See generally Matter of Grand Jury Proceedings Empaneled May 1988*, 894 F.2d 881, 882-83 (7th Cir. 1989). The success of Cook's challenge to the civil contempt fines is for the most part contingent on this court reversing the district court's October 4, 1989 order, since Cook again attacks the district court's jurisdiction to enter that order. Because we affirm that order, Cook's challenge to the contempt citation also must fail.

However, we can affirm the contempt citation without even reaching the issue of the order's validity. Parties must obey court orders regardless of their validity, unless the orders are stayed pending appeal. In effect, Cook's only reason for disobeying the order is that he believed it to be wrong. Even if that were true, Cook was obligated to obey the order or be held in contempt:

> If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal.

Maness v. Meyers, 419 U.S. 449, 458 (1975).

On appeal, Cook acknowledged that class members still have not received full payment, and admitted that the money he took from the fund without authorization has already been spent and is no longer available for disbursement. For the class members who still await full payment, now 12 years after the onset of this litigation, that is most unfortunate. This opinion sets forth in some detail the unprofessional manner in which Cook Partners has prosecuted

this litigation. Although many of the issues raised by Cook are frivolous, we see no point in heaping further sanctions on a lawyer and law office facing large contempt fines. However, a copy of this opinion will be submitted to the Illinois Attorney Registration and Disciplinary Commission with a suggestion that it investigate the conduct of Rufus Cook and Cook Partners in this litigation. Circumventing and ignoring district court orders in the manner described above will not be condoned.

For all of the foregoing reasons, the October 4, 1989 and April 2, 1990 orders of the district court are, in all respects,

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

May 10, 1991

Before

Hon. RICHARD A. POSNER, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

SILAS J. ALEXANDER, MARY ALLION and KAREN TURNER, et al.,

and

EARL ALEXANDER, HERMAN BARNETT and KYL BOOKER, et al.,

Plaintiffs-Appellees,

Nos. 89-3440 & 90-1807 *v.*

CHICAGO PARK DISTRICT, LESLIE P. LISS, as attorney and agent for the CHICAGO PARK DISTRICT, and in his individual capacity and PATRICK O'MALLEY, et al.,

Defendants.

Appeal of: RUFUS COOK and COOK PARTNERS LAW OFFICES, LIMITED.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 79 C 2242

Ilana D. Rovner, *Judge.*

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Appellants, no judge in active service has requested a vote thereon,* and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

---

*Circuit Judge Walter J. Cummings did not participate in the consideration or disposition of the petition for rehearing and suggestion for rehearing *en banc.*

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

George L. Saunders, Esq.
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89-3440

Enclosed is a copy of a document issued by this court in the above captioned case. Since this will be the only copy your firm will receive, if applicable, please circulate this order to other members of your firm who may have an interest in this case.

(fold)

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No. 91-560

In The

Supreme Court of the United States

October Term, 1991

SILAS ALEXANDER, et al.

v.

CHICAGO PARK DISTRICT, et al.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Dated: February 11, 1992

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In their Petition for a Writ of Certiorari, Petitioners Rufus Cook and Cook Partners Law Offices, Ltd. (collectively "Cook") seek review of the decision of the United States Court of Appeals for the Seventh Circuit affirming the district court's (1) October 4, 1989 order directing Cook to pay to Respondent Count II Subclass the full amounts due and owing from a settlement fund; and (2) April 12, 1990 order holding Cook in civil contempt for failing to comply with the October 4, 1989 order.

Since the filing of the Petition for Writ of Certiorari, Cook and the Count II Subclass have entered into a

settlement agreement resolving all claims and disputes between them. On January 21, 1992, the district court approved the settlement and entered an Agreed Order in which it (1) vacated the civil contempt finding entered against Cook; (2) vacated the civil contempt fines imposed on Cook; and (3) dismissed with prejudice all claims that the Count II Subclass had against Cook. *See* Appendix (attached).

REASONS TO DENY THE PETITION FOR A WRIT OF CERTIORARI

THERE IS NO LONGER ANY CASE OR CONTROVERSY BECAUSE THE PARTIES HAVE SETTLED THE UNDERLYING DISPUTE AND THE DISTRICT COURT HAS VACATED THE CIVIL CONTEMPT FINDING AND THE FINES AGAINST PETITIONERS.

Cook and the Count II Subclass have fully and finally settled the dispute underlying the district court's orders that were the subject of the court of appeals' decision and are the subject of Cook's Petition. The district court has dismissed with prejudice the Count II Subclass' claims against Cook and has vacated the contempt finding and fines it had imposed. The Count II Subclass has no further interest in this matter.[1] Accordingly, the issues Cook

[1] The settlement agreement between Cook and the Count II Subclass provided that, although Cook did not agree to dismiss the Petition to this Court, Cook would have no right to recover sums paid to the Count II Subclass in settlement regardless of any future decisions of this Court or any court on remand.

seeks to present to this Court are moot. There is no case or controversy, and the Petition for Writ of Certiorari should be denied.

CONCLUSION

For all these reasons, Respondent Count II Subclass respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Counsel for Respondent
Count II Subclass

Dated: February 11, 1992

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SILAS ALEXANDER, *et al.*, *Plaintiffs,*	)	No. 79 C 2242
v.	)	Judge Rovner
CHICAGO PARK DISTRICT, *et al.*, *Defendants.*	)	

AGREED ORDER

This matter comes on to be heard on the Joint Motion to Approve Settlement submitted by counsel for Rufus Cook and Cook Partners Law Offices, Ltd. (collectively "Cook") and counsel for the Count II Subclass.

1. The Court has reviewed the terms of the attached Settlement Agreement and Release submitted by the parties. The Court has been informed that each of the nineteen (19) members of the Count II Subclass has been fully informed of the terms of the settlement, has approved such terms and has requested the Court, through counsel, to enter this order in order to effectuate the settlement.

2. Each member of the Count II Subclass has executed a Waiver of Fairness Hearing, copies of which have been provided the Court, in which he/she waives any right to have the Court conduct a fairness hearing in connection with the settlement, states that he/she has been fully advised concerning the terms and conditions of the proposed settlement and has reviewed a copy of the proposed Settlement Agreement and Release, states

that the settlement is fair and is in the class member's best interests, and states that he/she has instructed counsel for the Count II Subclass to move forward to implement the settlement on the terms and conditions set forth in the Settlement Agreement and Release.

3. Counsel for the Count II Subclass has informed the Court that Cook has delivered to counsel for the Count II Subclass the total amount of Two Hundred Twenty-One Thousand Two Hundred Ninety-Four and 32/00 dollars ($221,294.32) in the form of nineteen separate checks, one check to the order of each of the nineteen members of the Count II Subclass in the amounts set forth in the Settlement Agreement and Release.

4. In accordance with the terms of the settlement, the Court hereby finds that Cook, through his/its compliance with the terms of the Settlement Agreement and Release, will have purged himself/itself of the civil contempt finding entered by this Court on April 12, 1990.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

a. The civil contempt finding entered against Cook in the Court's order dated April 12, 1990, is hereby vacated;

b. The civil contempt fine imposed on Cook in the Court's order dated April 12, 1990, is hereby vacated;

c. The claims of the Count II Subclass against Cook are hereby dismissed with prejudice.

/s/ Ilana D. Rovner
U.S. District Judge

Enter: January 21, 1992

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In The Supreme Court of the United States October Term, 1991

SILAS ALEXANDER, et al.,

v.

CHICAGO PARK DISTRICT, et al.,

RUFUS COOK
and
COOK PARTNERS LAW OFFICES, LIMITED,
Counsel for Plaintiffs in the District Court,
Petitioners

REPLY TO BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. 91-560

IN THE
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OCTOBER TERM, 1991

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v.

CHICAGO PARK DISTRICT, et al.,

RUFUS COOK
and
COOK PARTNERS LAW OFFICES, LIMITED,

Counsel for Plaintiffs
in the District Court,
Petitioners

REPLY TO BRIEF IN OPPOSITION

Preliminary Statement

Pursuant to Supreme Court Rule 15.6, Petitioners hereby submit this Reply to Respondent's Brief in Opposition to the Petition for a Writ of Certiorari. This brief addresses an important new issue that is raised in the Brief in Opposition: The

parties reached a partial settlement of the matters pending before the District Court. (Brief in Opposition at 1-2). In January 1992, Petitioners paid the principal amount in dispute to the class members and, upon such payment, the District Court agreed to lift all contempt charges and to lift all charges for interest. (Appendix to Brief in Opposition). In their brief, the Respondent argues that the Petition for a Writ of Certiorari should be denied because the matter in question became moot upon execution of that settlement. (Brief in Opposition at 2-3). But as this Reply Brief will demonstrate, this matter is not moot, as it involves important issues that relate to the professional reputations of a lawyer and a law firm. But even if the Respondent is correct, the proper remedy is to grant certiorari, dismiss the case as moot, and vacate the judgments below.

Argument

I. Significant Collateral Consequences of The District Court's Contempt Order Prevent a Finding of Mootness.

Ordinarily, where a dispute is settled by the parties, the case becomes moot, and there is no longer a justiciable controversy that may be addressed by any court. That rule, however, is not without exception.

The most important exception to this general rule is found in this case: a matter is not moot if the collateral consequences to the lower court's decision will adversely affect a party's interests. In such a case, the collateral consequences preserve the actual controversy, allowing the court to hear the dispute. This rule was set out by this Court in Carafas v. LaVallee, 391 U.S. 234 (1968), where a prisoner appealed the denial of a petition for a writ of habeas

corpus. While the appeal was pending, the prisoner was released after serving the balance of his sentence. Id. at 236. The state argued that the appeal on the habeas petition was moot, but this Court held that the prisoner could suffer significant adverse collateral consequences to a criminal conviction, such as restrictions on his rights and damages to his ability to gain certain types of employment. Id. at 238-39. Such collateral consequences were sufficient to prevent the matter from being moot, thereby allowing the Court to hear the appeal. Id. See also Sibron v. New York, 392 U.S. 40 (1968).

In our case, the collateral consequences doctrine prevents the case from being moot. There are significant collateral consequences of the District Court's contempt finding that could have an important bearing on the legal

careers and professional reputations of the Petitioners. For example, as a result of this controversy, the Petitioners have been served with a complaint from the Illinois Attorney Registration and Disciplinary Commission[1]. If certiorari is granted, this Court may address important issues that relate to the propriety of the Petitioners' actions, which could have a direct bearing on the Petitioners' defense in that pending disciplinary action.

Even beyond the pending disciplinary proceeding, the lower court's proceedings have placed a terrible scar on the Petitioners' reputations. The District Court's contempt finding against the Petitioners rests upon a number of highly defamatory remarks: in its opinions, the

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[1] The disciplinary proceeding is captioned Rufus L. Cook, In Re Earline Oglesby, No. 89-CI-4050.

District Court accused the Petitioners of "egregious" behavior, of misleading the court, of intentionally circumventing the court's orders, of willfully disobeying orders from the court, of being more interested in their own financial benefit than the interest of the class, of acting in an unscrupulous fashion toward the class members, and of declining to request attorneys' fees because the Petitioners recognized that the work that they had performed was substandard.[2] In the Seventh Circuit Court of Appeals opinion, that court accused the Petitioners of intentionally deceiving the District Court, suggested that the Petitioners hid the existence of the contingent fee agreements from the District

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[2] The District Court statements are contained in several orders in Alexander v. Chicago Park Dist., No. 79 C 2242 (N.D. Ill.). The statements appear as follows: October 4, 1988 Order at 9-11; April 2, 1990 Order at 8; December 6, 1988 Order at 5; and September 26, 1988 Order at 16, 18.

Court, and chastised the Petitioners for unprofessional conduct. (Appendix to Petition for Writ of Certiorari at 18-21, 22-23)

As is fully explained in the Petition for a Writ of Certiorari, these charges have absolutely no basis whatsoever. Throughout this litigation, the Petitioners have comported themselves with a degree of service to the class that is to be emulated: they prosecuted the class members' claims for more than ten years without ever demanding compensation for their services; they sought only a portion of the massive costs that they had incurred in those ten years of litigation; they kept the District Court fully informed of their intentions and their actions with respect to their contingent fee agreements with the class; and they achieved substantial benefits for the class members.

In short, there is no basis for the inflammatory, damaging statements made in the lower court opinions, and such statements clearly threaten the future of the Petitioners' careers.

And the Petitioners' professional reputations are especially important, given the nature of their law practice, which involves class action civil rights litigation. Under Rule 23 of the Federal Rules of Civil Procedure, a court reviewing the adequacy of a putative class representative may evaluate the character of the lawyer applying to represent the class. At least one court has already cited this litigation as a basis for denying such an application. See Armstrong v. Chicago Park Dist., 117 F.R.D. 623 (N.D. Ill. 1987). Clearly, the aspersions that have been cast on the character of the Petitioners in the

opinions in this case are sufficient collateral consequences to allow the Court to hear this matter.

The collateral consequences doctrine properly applies in a civil action such as this case. For example, in Papish v. Board of Curators of the Univ. of Missouri, 464 F.2d 136 (10th Cir. 1972), a lawsuit brought by a graduate student to challenge a University disciplinary action against her, the appellee argued that the matter was moot because the student had been dismissed from the University for academic reasons while the appeal was pending. The Fifth Circuit Court of Appeals held that the case was not moot because the lower court's decision still had collateral consequences for the student, whose reputation had been irreparably damaged by the disciplinary action. Id. at 141-42. On that basis, the Fifth Circuit considered

the merits of the controversy. Id. at 142-45. The United States Supreme Court later granted certiorari on that case and reversed the Fifth Circuit's decision on the merits but never addressed the mootness issue. Papish v. Board of Curators of the Univ. of Missouri, 410 U.S. 667 (1973). A number of other appeals in civil cases also have applied the collateral consequences doctrine.[3]

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[3] See, e.g., Wiley v. National Collegiate Athletic Assn, 612 F.2d 473 (10th Cir. 1979) (validity of athletic records was sufficient collateral consequence to preclude a finding of mootness in lawsuit to block revocation of eligibility of an athlete, despite fact that such eligibility expired pending the appeal); Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980) (risk that restrictions on school curriculum could chill academic freedom was sufficient collateral consequence to preclude a finding of mootness, despite the fact that restrictions were abandoned pending appeal); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980) (stigma associated with Navy disciplinary action was sufficient collateral consequence to preclude a finding of mootness in a lawsuit seeking to block early discharge, despite fact that sailor allowed his term of enlistment to expire pending the appeal); Winnick v. Manning, 460 F.2d 545 (2d Cir. 1972) (threat that university disciplinary action could mar an academic record was sufficient collateral

(continued...)

And a number of courts have held that an attorney's reputation may serve as a collateral consequence sufficient to preclude a finding of mootness. For example, the collateral consequences doctrine was applied in Javits v. Stevens, 382 F. Supp. 131 (S.D.N.Y. 1974), a lawsuit seeking to block a disciplinary proceeding brought against a lawyer who was accused of bribing a foreign official. As part of its defense, the State of New York alleged that the lawsuit was moot because, during the pendency of the appeal, the lawyer had been suspended from the practice of law, the period of suspension had expired, and the lawyer had died. Id. at 133-36. The district court disagreed,

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[3](...continued)
consequence to preclude a finding of mootness, despite the fact that student had been readmitted pending the appeal); Hatter v. Los Angeles City High School Dist., 452 F.2d 673 (9th Cir. 1971) (disciplinary action that threatened to prejudice applications for college admission was sufficient collateral consequence to the student to preclude a finding of mootness).

finding that an attorney's reputation is so important to his career that the case would be allowed to proceed. Id. at 136. Similarly, in both United States v. Lee, 720 F.2d 1049 (9th Cir. 1983) and United States v. Schrimsher, 493 F.2d 842 (5th Cir. 1974), the court held that a finding of criminal contempt has significant collateral consequences for a lawyer's professional reputation, precluding a finding of mootness, even after the attorney had completed the sentence. And in In re Kave, 760 F.2d 343 (1st Cir. 1985), the court held that an attorney's compliance with a civil contempt order would not render the case moot because a contempt finding could result in disciplinary proceedings against the lawyer. Such proceedings, the court held, constituted collateral consequences that precluded a finding of mootness. Id. at 353.

Hence, the settlement of the monetary aspects of the case does not moot this appeal, as the issues before the court are important to the professional reputation and livelihood of the Petitioners.

II. If the Case Is Moot, the Proper Course of Action Would Be to Grant Certiorari and Vacate the Lower Court Decisions.

Assuming that this Court determines that this cases is moot, the Respondent has suggested the wrong remedy: rather than mandating a denial of certiorari, a finding of mootness mandates that this Court grant the certiorari petition and vacate the judgments below. Such a result is set as the rule of law in United States v. Munsingwear, Inc., 340 U.S. 36 (1950), where the Court stated:

> The established procedure of the Court in dealing with a civil case from a court in the federal system which has become moot on the way

> here or pending our decision is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in Duke Power Co. v. Greenwood County, 299 U.S. 259, 81 L. Ed. 178, 57 S. Ct. 202, to be "the duty of the appellate court." That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented by happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

Id. at 39-40. This rule of law applies where the case becomes moot while a petition for certiorari is pending before this Court. See, e.g., Chicago Board Options Exchange v. Board of Trade, 459 U.S. 1026 (1982); State Fair of Texas v. Consumer Products Safety Commission, 454 U.S. 1026 (1981); Alabama v. Davis, 446 U.S. 903 (1980); Hopper v. Barnett, 439 U.S. 1041 (1978).

This Court's procedure is fully laid out in New Left Education Project v. Board of Regents, 472 F.2d 218 (5th Cir. 1973), vacated, 414 U.S. 807 (1973). In that case, the Court of Appeals held that a settlement that was reached while an appeal was pending rendered the case moot. Id. at 220. However, even after making that finding, the Court of Appeals refused to vacate the lower court opinion, in clear violation of the Munsingwear doctrine. Id. at 221. When this Court was presented with a petition for a writ of certiorari, this court followed Munsingwear, and vacated the lower court opinions. New Left Education Project v. Board of Regents, 414 U.S. 807 (1973). This rule is also illustrated by Security Bancorp v. Board of Governors, 655 F.2d 164 (9th Cir. 1981), vacated, 454 U.S. 1118 (1981).

This case presents no reason to depart from the rule of law set out in Munsingwear. The parties reached a settlement on the financial aspect of the underlying claim -- the Petitioners agreed to pay part of the amounts allegedly due from them in return for a cessation of collection efforts against them and in return for an end to an ever-increasing contempt fine. (Appendix to Brief in Opposition). Notably, the Petitioners did not in any way pay any amount allegedly due as a penalty, as interest, or as a fine. (Appendix to Brief in Opposition). In reaching the settlement agreement, the Petitioners expressly reserved the right to prosecute this appeal to resolve the important issues remaining with respect to their professional reputations. In such circumstances, where a party has made every effort to put a matter behind him, a lower court judgment that casts aspersions on his

character should not stand, possibly to be later used in a proceeding against him. By vacating the lower court's judgment, this Court would encourage settlements in these types of cases, by allowing the parties to have a final chapter to this entire unfortunate episode, without having to worry about collateral estoppel effects of an opinion that has been found moot by this Court.

This result is only fair: if the Petitioners are not to have an opportunity to vindicate their reputations before the Court, then the Petitioners should not have to suffer the consequences of the aspersions to their character that are contained in the lower court opinions in this case. The only fair result, if this Court declines to grant certiorari on the grounds of mootness, would

be to vacate the lower court opinions in this case.

Unfortunately, the clear procedure set out in Munsingwear has not always been followed by the Seventh Circuit Court of Appeals. See, e.g., In re Memorial Hospital of Iowa County, 862 F.2d 1299, 1301 (7th Cir. 1988). As such, it appears that an order from this Court will be needed to vacate the lower court opinions in this case.

Conclusion

For the foregoing reasons, the Petitioners respectfully request that this Court allow the Petition for a Writ of Certiorari. The important issues raised by this case, which relate to the reputations and careers of the Petitioners, satisfy the collateral consequences doctrine, presenting this Court with a live controversy. In the

alternative, if this Court finds that the controversy is moot, the Petitioners urge this Court to issue a Writ of Certiorari and vacate the lower court judgments.

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